STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 6, 2006
v	No. 258284 Ingham Circuit Court
DEON LAMONT JOHNSON, Defendant-Appellant.	LC No. 02-000115-FH

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant was sentenced after remand by this Court as a habitual offender-second, MCL 769.10, to 57 to 90 months' imprisonment for possession of a firearm by a felon, MCL 750.224f, and 43 to 72 months' imprisonment for felonious assault, MCL 750.82.[1] He appeals as of right. We affirm defendant's sentences but remand for preparation of a sentencing guidelines departure form. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant falsely represented himself to the victim, Hsiao-Ching Liu, as possessing a master's degree in computer science, as a co-owner of a business, and as the son of a retired police chief. Defendant asked Liu for $30,000 to bail out his business from bankruptcy. Thinking that she was purchasing defendant's share of the business, Liu gave him $26,000. Four days later, on February 24, 2001, defendant became angry when Liu refused to lend him more money to buy a car. He dragged Liu outside and hit her, stepped on her stomach, and kicked her. He then threw Liu into her car and pointed a loaded gun at her head and eyes and put it in her mouth. Defendant cocked the gun, and Liu testified that she believed she was going to die. After Liu stated that she would help defendant, he dropped her off at her apartment, but kept her vehicle. Believing that defendant was associated with the police, Liu did not immediately call the police. Two days later, defendant picked up Liu in her car and requested that she obtain a loan for him to buy a new car. Liu, believing that she would be killed if she did not comply,

[1] Defendant's additional sentences of two years' imprisonment for possession of a firearm during the commission of a felony, MCL 750.227b, and 93 days' imprisonment for assault or assault and battery, MCL 750.81, are not at issue on appeal.

obtained a loan check in the amount of $27,000, which she gave to defendant. She later cancelled the check and called the police.[2]

Following a jury trial, defendant was sentenced as a third-offense habitual offender to 57 to 120 months' imprisonment for the felon-in-possession conviction and 43 to 96 months' imprisonment for the felonious assault conviction. The trial court also ordered restitution in the amount of $24,000. This Court remanded for resentencing, holding that although the amount of restitution ordered was appropriate, two prior record variables had been improperly scored and that defendant should have been sentenced as only a second-offense habitual offender. *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2004 (Docket No. 247618).

On remand, the trial court again imposed minimum sentences of 57 months for the felon-in-possession conviction and 43 months for the felonious assault conviction, departing from the revised guidelines' ranges of 14 to 36 months and 12 to 30 months, respectively. The trial court stated:

> I've had an opportunity to review the information submitted in the pre-sentence report. I do recall vividly the trial and the testimony of the victim in this case. The Court does find that there are substantial and compelling reasons to depart from the guidelines which are not accounted for in the guidelines. Number one being the $24,000 in restitution which is a considerable [sic] high amount. Secondly, the nature of the harm done in this Court's opinion is irresistibly grabbing enough to go outside the guidelines. The violent nature of the offense, the fact that the victim testified that she is in fear and that she is unable to continue a normal life because of the fear that has occurred with respect to the violent nature of the crime that was committed against her by the Defendant. The repeated acts by the Defendant all of a violent nature, over four felony convictions, all, again, violent. But the irresistible grabbing is the fact that the victim is continually terrorized every day because of what occurred to her and what the Defendant was found guilty of committing. That, in this Court's opinion, justifies substantial and compelling reasons to depart from the guidelines.

Defendant now argues that the trial court erred in departing from the revised guidelines' range. We disagree.

A sentencing court must impose a minimum sentence within the guidelines' range unless a departure from the guidelines is permitted. MCL 769.34(2). A court may depart from the appropriate sentence range established under the sentencing guidelines "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). A substantial and compelling reason for departure is one that is "objective and verifiable," and that "'keenly' or 'irresistibly' grabs [the court's] attention [and] is of 'considerable worth' in deciding the length of a sentence." *People v Babcock*, 469 Mich 247,

[2] Reference may be made to this Court's prior opinion in this matter, *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2004 (Docket No. 247618), for a complete recitation of the facts.

270; 666 NW2d 231 (2003), quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). The trial court "shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

The existence or nonexistence of a particular factor as justification for a guidelines departure is a matter of fact for the sentencing court to determine and is thus reviewed by this Court for clear error. *Babcock*, *supra* at 264. The determination that a factor is objective and verifiable is reviewed as a matter of law. *Id*. Finally, the determination that there are substantial and compelling reasons to depart from the guidelines is reviewed for abuse of discretion. *Id*. at 264-265. An abuse of discretion occurs "when the trial court chooses an outcome falling outside [the] principled range of outcomes." *Id*. at 269.

The trial court's first cited reason for departure, the high amount of restitution, is an appropriate factor justifying the departure. The amount of restitution was not taken into consideration in the scoring of the guidelines. The magnitude of the restitution ordered is objective and verifiable. Moreover, we agree with the trial court that $24,000 is a considerably high amount of money to be owed as restitution to a single individual and that it might properly be considered a factor that "'keenly' or 'irresistibly' grabs [the court's] attention" and is "of 'considerable worth' in deciding the length of a sentence." *Babcock, supra* at 257-258, quoting *Fields, supra*.

The second cited departure factor, the violent nature of the offenses against Liu, is a factor that was already taken into consideration in the scoring of the sentencing guidelines. Defendant was assessed 15 points for OV 1 (aggravated use of a weapon) for having "pointed [a firearm] at or toward a victim," MCL 777.31(1)(b), 10 points for OV 3 (physical injury to a victim) for having caused "[b]odily injury requiring medical treatment," MCL 777.33(1)(d), and five points for OV 10 (exploitation of vulnerable victim) for having "exploited a victim by his or her difference in size or strength . . . ," MCL 777.40(1)(c). Although we believe the record in this case could support a departure on the basis that the egregious facts of this case are not adequately reflected in the sentencing guidelines, the trial court failed to articulate those facts as being inadequately weighed, as required by MCL 769.34(3)(b). Accordingly, we hold that the record before us does not support this factor as a justification for a departure.

Thirdly, the trial court cited Liu's testimony that she was "in fear" and "unable to continue a normal life," and "terrorized every day because of what occurred to her." However, psychological injury to the victim was already taken into account in determining the guidelines' range. Defendant received 10 points for OV 4 for inflicting "[s]erious psychological injury requiring professional treatment . . . ." MCL 777.34(1)(a). Moreover, as defendant points out, the record is simply devoid of any such testimony by Liu.[3] Accordingly, the trial court clearly erred in relying on it in departing from the guidelines. *Babcock, supra* at 264.

[3] Although the prosecution relies on a letter from Liu's therapist indicating that she suffered from Post Traumatic Stress Disorder and other psychological problems, the trial court did not refer to

Finally, the trial court stated that "[t]he repeated acts by the Defendant all of a violent nature, over four felony convictions, all, again, violent," justified a departure. As defendant notes, the trial court misspoke to the extent that it indicated that defendant had four prior violent felony convictions. Rather, his prior record included only one violent felony, a 1987 conviction for assault with intent to do great bodily harm. Nevertheless, in addition to this felony, defendant's prior misdemeanor record included a 1986 conviction for attempted aggravated assault, convictions in 1992 and 2001 for aggravated assault, and a 1995 conviction for domestic violence. The clear thrust of the trial court's ruling is that defendant had exhibited a continuing pattern of committing violent assaultive acts.

Defendant's criminal history was partially taken into account in determining his guidelines' range. He received 25 points for PRV 1 for having "1 prior high severity felony conviction." MCL 777.51(1)(c). He received 15 points for PRV 5 for having five or six prior misdemeanor convictions or misdemeanor juvenile adjudications. MCL 777.55(1)(b). Defendant additionally received 10 points for PRV 6 for being "on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony," MCL 777.56(1)(c), and 20 points for PRV 7 for having "2 or more subsequent or concurrent [felony] convictions," MCL 777.57(1)(a). However, the trial court was entitled to conclude that the guidelines did not adequately take into consideration defendant's continuing pattern of *assaultive* behavior. This factor is objective and verifiable, and defendant's lengthy history of assault convictions, stretching over 15 years and including five prior violent offenses in addition to the two assault convictions in the instant case, is something that keenly or irresistibly grabs our attention.

Furthermore, it is clear from the record that the trial court would not have sentenced defendant differently if it had not relied on two improper reasons for its departure. See *Babcock*, *supra* at 261 n 15. The trial judge explicitly stated that her sentence should be sustained "if an appellate court determines that any of my rationale for departure survive[s] review" under *Babcock*. We are satisfied that the trial court clearly would have imposed the same sentences—which, not coincidentally, consisted of the same minimum sentences imposed at the original sentencing—even if it had not relied on the improper factors of the violent nature of the instant offenses and psychological harm to the victim. Accordingly, we affirm the sentences in accordance with *Babcock*, *supra* at 260-261.

Defendant additionally argues that he is entitled to resentencing under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, Michigan's sentencing system "is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by a jury in violation of the Sixth Amendment." *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004).[4]

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this letter, nor is it apparent from the record that the trial court reviewed it, and it is not contained in the record before us.

[4] We note, however, that our Supreme Court has granted leave to appeal in *People v Drohan*, 264 Mich App 77; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005), to consider whether *Blakely*, *supra*, and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), apply to Michigan's indeterminate sentencing scheme.

Finally, defendant argues that he is entitled to resentencing because the trial court failed to complete a sentencing guidelines departure form indicating its reasons for departing. Although we agree that the trial court is required under *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001), to complete a departure form, the appropriate remedy is not resentencing, but merely a remand for completion of this "ministerial task." *Id*.

Defendant's sentences are affirmed but the matter is remanded for completion of a sentencing guidelines departure form. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra